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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

*Petitioners,*

*vs.*

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

*Respondent.*

## REPLY BRIEF FOR PETITIONERS.

CHARLES E. HUGHES,
100 Broadway,
New York, New York.
SAMUEL TOPLIFF,
HOMER H. COOPER,
105 South La Salle Street,
Chicago, Illinois.
*Counsel for Petitioners.*

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

*Respondent.*

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## REPLY BRIEF FOR PETITIONERS.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### A. EQUITY JURISDICTION.

In submitting this case to the Supreme Court for review, the petitioners stated specific reasons for reversal of the judgment of the Circuit Court of Appeals. Among those reasons was:

1. That the Circuit Court of Appeals, by its decision, has erred in deciding an important question of local law

in a way in conflict with applicable local decisions in that said lower court has definitely decided certain facts or circumstances do constitute a cloud upon the title to Illinois realty, whereas controlling Illinois law declares such facts or circumstances do not constitute any cloud on title. (Petition for Writ of Certiorari, 2, 12, 28; Brief for Petitioners, pp. 3, 40.)

Equity jurisdiction was sustained in the Circuit Court of Appeals solely and exclusively upon the theory that the petitioners had clouded the title of the respondent, thereby committing a legal wrong which a court of equity has power to redress. Our attack upon the decision of the Circuit Court of Appeals was directed very largely against that premise thus made essential to support its conclusion; for, minus that cloud upon title, as the opinion of the lower court concedes, no wrong exists and no justiciable case is presented.

Instead of meeting that issue, respondent's brief omits any particular defense for the process by which the Circuit Court of Appeals reached its conclusion. Instead of attempting to justify the lower court's holding that the petitioners have clouded the respondent's Illinois title, the respondent's brief travels the interesting but unhelpful steps in the development of equity jurisprudence to restate principles with which we never have quarreled because they are irrelevant. The genesis, growth, nature and extent of the jurisdiction of a chancellor to grant relief in a *proper* case are not here involved. Our contention is that no proper case or controversy exists for the reason that the essential element of a legal wrong done by any defendant to the plaintiff does not appear.

In our principal brief, we have pointed out wherein the Circuit Court of Appeals erred by its holding that

there is a justiciable case for that, as its opinion expressly declares, the petitioners have wronged the respondent by clouding its title to real estate. We have demonstrated by decisions of this Honorable Court that the property law of Illinois, and none other, is applicable and controlling to determine whether the respondent's Illinois title ever has been clouded; and we have further demonstrated that decisions of the Supreme Court of Illinois hold repeatedly and consistently that doubtful provisions in an owner's sole instrument of title, coupled with oral hostile assertions as to the interpretation of said provisions by other parties signatory to said instrument, do not constitute in Illinois a cloud upon that title or a legal wrong against the owner of that title.

OBSTACLES ARE NOT WRONGS.

Respondent's avoidance, not answer, of our presentation is its contention (Respondent's Brief, p. 15) that "when there is a legal right to the beneficial use of property" and "when *obstacles* prevent the present enjoyment of that right," a court of chancery may "remove those obstacles" unless relief at law exists.

What obstacles prevent present enjoyment of the tenant's alleged rights? Respondent's whole reply is, doubtful clauses in the leases and the petitioners' orally manifested disagreement as to the meaning of those clauses. Let us consider those "obstacles" separately, then together.

The leases were bargained fairly forty years ago; no charge is made that anyone was overreached or that the instruments fail to state the intentions of the parties. The evidence shows that Walker, our predecessor in

title, was one of the organizers of the Chicago Auditorium Association; that so friendly and co-operative were the first landlords and tenant that the building actually was under construction several months before the leases were made and executed. The leases, as then made, are the only contracts by which the fee-owners ever granted to the tenant any and all its rights for beneficial use of the property. If, then, the terms and provisions of those leases now present an obstacle to some new or different use of the property, that obstacle, lying in and sanctioned by the matured, valid contracts, must stand unless courts have the power to remake the contracts or the parties themselves remake them. No question of public policy is involved; the question is whether private contracts do or do not grant to the tenant the rights it claims. That question, however approached, is a problem of construction, and we think we need not repeat our points and authorities holding that courts of equity of the United States lack original jurisdiction over suits simply to construe instruments *inter vivos* in order to declare land titles. (See our principal brief, pp. 28-29.)

Again, if the clauses in the leases do actually present obstacles to use of the property, the petitioners committed no wrong by putting them there; the language selected was the language of both parties, and for nearly four decades no complaint ever arose. Now that performance of its agreements by the tenant may deprive it of a changed, unauthorized beneficial use of the property, the tenant seeks to have the courts make possible such unwarrantable advantage by a decree removing, as some sort of obstacle, the objectionable covenants from its granting instruments. Courts have no such power.

Respondent's other "obstacle" is said to be the peti-

tioners' orally manifested refusal to coincide with respondent's views as to the interpretation and force of various covenants in the leases which respondent in its bill of complaint and elsewhere concedes are very doubtful.

In his one conversation with the president of the respondent company, our Mr. Willing was in no sense an aggressor. President Clinch sought Mr. Willing, opened the discussion, broached the proposal. Mr. Willing simply said he did not believe, after consultation with his lawyers, the tenant had a right to tear down the Auditorium, which may be construed to mean that the Willing interests, as landlords, did not consent to the only proposal President Clinch then made. The court will observe that Mr. Willing's attitude was otherwise wholly passive; that he made no threat of forfeiture or of any legal proceedings. The threat of litigation came from President Clinch, and not until after that threat was fulfilled by the institution of this lawsuit did any landlord ever make his position known upon the records or elsewhere. Mr. Willing had a right to disagree with President Clinch in that conversation, even if Mr. Willing were ill-advised. By so doing, he did no legal wrong to the respondent for purported relief against which the respondent may call upon the courts. Elsewhere we have presented abundant, compelling authority that by Illinois law Mr. Willing's words, spoken within the confines of his office and heard by none save the parties themselves, constitute no cloud upon the respondent's title, and create no improper obstacle to whatever beneficial use of the property the tenant may possess. There was no unlawful act; there was no promise or threat of any unlawful act; there was no legal wrong committed by anyone.

Persons who, like Mr. Willing, conceive that their rights are involved or may be involved in controversies are entitled to think, to discuss, to take the advice of counsel.

(1913) *Venner* v. *Chicago City Ry. Co.* 258 Ill. 523 on 550.

(1902) *Chicago Telephone Co.* v. *N. W. Tel. Co.* 199 Ill. 324 on 365-6.

(1919) *Mumford* v. *Rock Springs Ass'n.* 261 Fed. 842 on 849.

Thus it appears that neither of the alleged "obstacles" mentioned by respondent as preventing its desired beneficial use of the property is a wrong done by the petitioners for which respondent is entitled to invoke the jurisdiction of a court of equity. Adding one to the other avails nothing. As was said in (1916) *McCarty* v. *McCarty*, 275 Ill. 573 (our brief, pp. 21-2), where there were both doubtful clauses in a plaintiff's own grant and orally manifested counterclaims, "no controversy in any legal form has arisen and there is no occasion to call upon a court to quiet a title already quiet and in a state of perfect tranquility."

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Just here it seems proper to refute respondent's belief that the force of *McCarty* v. *McCarty*, 275 Ill. 573, is lessened by the later decision in *Fulwiler* v. *McClun*, 285 Ill. 174. (Respondent's Brief, pp. 47-9.) The latter in nowise detracts from the former as an authoritative holding of the Illinois Supreme Court for the purpose we first cited it.

The *McCarty* case started as a bill to construe a will under Section 50 of Chapter 22, Illinois Revised Stat-

utes, which is set forth in the footnote.* The Illinois court first held that there was no ambiguity in the will requiring construction and that no provision of the statute was applicable to sanction jurisdiction thereunder. Thereupon, the litigant, so rebuffed, asked the court to decide the parties' oral dispute by considering the bill as one to quiet title or remove a cloud; and, as we have shown, the court said there was no cloud and dismissed the bill.

But the *Fulwiler* case started and finished as a bill to construe a will under the Illinois statute. The opinion indicates that counsel for the defendants in the case believed the will so unambiguous as not to need construction, and that under so much of the *McCarty* case rule *as bore upon cases under the statute* the bill should have been dismissed. In eight lines of the opinion, the Supreme Court says the *Fulwiler* case is different on the facts to the extent that the statutory provisions covering "the conservation, preservation, protection or betterment of said estate during a period of contingency pending a contingent remainder or executory devise or other-

* "The Court may hear and determine bills to construe wills, notwithstanding no trust or questions of trust or other questions are involved therein; and hear and determine bills to appoint trustees, and authorize trustees to lease, mortgage and sell, improve, exchange and invest any portion or all of any trust estate, or to do any other act or thing, or exercise any power and discretion which is necessary for the conservation, preservation, protection or betterment of said estate during any period of contingency pending a contingent remainder or executory devise or otherwise; and may also hear and determine bills to quiet title, and to remove clouds from the title to real estate and bills to establish and confirm titles to real estate or incumbrance thereon whether the lands in controversy are improved or occupied, or unimproved or unoccupied; and the taking possession of such lands, after the commencement of suit by the party claiming the title or the adverse title, or any one under or through such person or persons shall not in anywise affect the complainant's right to a final decree upon his bill."

There is no contention or thought that this Auditorium bill of complaint is sustainable under above statute. Cases such as (1913) *Louisville & Nashville R. Co.* v. *Western Union Tel. Co.* 234 U. S. 369, 376, illustrate the reasons respondent heretofore has conceded render this Illinois remedial statute without force in federal courts.

wise" are applicable. Wherefore, the bill in *Fulwiler* v. *McClun* was sustained solely as a bill under the statute. Likewise, *Gavin* v. *Curtin*, 171 Ill. 640, from which respondent's brief quotes (p. 19), exemplifies the principle that, apart from statute, chancellors have long exercised jurisdiction in testamentary matters to preserve inheritances. In this Auditorium case now at bar, there is no will, no devise, no inheritance to protect—nothing whatsoever to invoke the Illinois statute, and certainly nothing to prompt opposing counsel into the astonishing statement that the *Fulwiler* case would settle the jurisdictional question in an Illinois court.

IRRELEVANT CONTENTIONS AND CASES.

Unable to support by Illinois decision that its title has been clouded or that any petitioner ever has committed any wrong against the respondent, counsel are driven to reiterated invocation of "broad principles" of equity jurisdiction. So broad is that power, they say, that whenever one has a legal right to use property, and cannot find some adequate writ in the law courts to help him use it, equity must step in to make the use available. This, they say, must result especially where subject matter of considerable value is involved, and regardless of the fact that no legal assault upon the averred legal right has been made by anyone. In this connection, counsel have observed that "a justiciable right does not require a wrong to bring it into being." We never, at any stage of this litigation, have said the contrary. Our point has been, and is, that suits or controversies to which the federal judicial function extends must contain more than the existence and assertion of a primary right possessed by a plaintiff; that, to quote

Pomeroy, there must also be presented "a delict or wrong done by the defendant which consisted in a breach of said primary right" and of a breach of duty devolving upon the defendant toward the plaintiff. (See our principal brief, pp. 30-31.) And in this behalf, we have, by the aid of controlling Illinois law and under long-established rules in the decisions of this Honorable Court, clearly shown that, assuming the respondent's primary right, there has been no delict or wrong done by any petitioner to that right. Hence, there is no case or controversy; there is nothing more than an application for a declaratory decree construing the leases and trust deeds to establish the averred primary right. The courts have no jurisdiction because there is no case or controversy.

The anomalous holdings in cases like *Rector* v. *Rector*, 201 N. Y. 1 (Respondent's Brief, p. 64); *Slegel* v. *Herbine*, 148 Pa. St. 236 (Respondent's Brief, p. 53); *Lovell* v. *Marshall*, 162 Minn. 18 (Respondent's Brief, p. 53) wherein opposing counsel perceive inclinations toward definitions of clouds upon title different from the Illinois definition, are not in point because Illinois real estate is here involved and Illinois substantive law controls.

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In conclusion of our reply to respondent's presentation of its argument for the exercise of equity jurisdiction, we repeat that counsel have failed to justify the holding of the Circuit Court of Appeals that the present bill is maintainable as a bill to remove clouds from title. The conclusion of the lower court rested upon its erroneous determination that the petitioners had clouded the respondent's title. To reach that conclusion, the lower court disregarded and, in effect, overruled nu-

merous decisions of the Supreme Court of Illinois as to what is a cloud on title. Since no cloud on title exists and since no legal wrong of any kind ever was done by any petitioner to the respondent, the suit becomes an application for a declaratory decree construing the leases and adjudicating a plaintiff's own doubtful title. The federal courts have no declaratory judgment jurisdiction and the bill should be dismissed as such.

## B. FEDERAL JURISDICTION.

The noteworthy concession in respondent's discussion of federal jurisdiction is that if the Willing defendants were indispensable parties to so much of the action as is directed against the Sears-Slater defendants, then there may not have been any separable controversy between the foreign removing Sears-Slater defendants and the local Illinois plaintiff. That is to say, respondent admits that if any Illinois citizen is an indispensable party defendant to the suit which it brought against the foreign Sears-Slater defendants, federal jurisdiction has been wrongfully retained over our motions to remand. Respondent's position is that no such Illinois defendant is or need be in the Sears-Slater controversy. With that position, we cannot agree.

It would be physically impossible to tear down so much of the Auditorium Building as rests upon the Sears-Slater fee without simultaneously wrecking a very considerable portion of the building resting on the Willing fee. As the bill avers, the tracts form one contiguous area covered by "one entire building," no part of which is "separable from the entire building taken as a whole." (R. 17.) The bill further avers that the five leases covering the entire area were substantially identical in terms and contemporaneous in execution, and that it was contemplated and intended by all of the parties to all five leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on the entire area, and that the present building was constructed in accordance with such intention and cannot be dismembered without heavy expense and loss.

The allegations of the bill, plus the law of Illinois by which each fee-owner obtained during construction an easement of support in the land and building on each adjacent tract, should, of themselves, be adequate to show that the bill would have been dismissable for want of indispensable parties if it, so drawn, had named as defendants thereto only the Sears-Slater trustees. Conceivably counsel for the respondent might have drawn a bill of complaint which on its face would not have shown lack of indispensable parties; but that is beside our question. The situation is, that in the pleading filed by the plaintiff to state its case the plaintiff in fact has set forth all five leases, the unseverable building, the facts showing inter-related easements, the identity of subject matter, the identity of issues—and the absolute need for the court to have jurisdiction over *all* the landlords.

The case made by the plaintiff's own pleading determines whether the case is removable.

(1890) *Graves* v. *Corbin*, 132 U. S. 571.

(1885) *Louisville, etc. Co.* v. *Ide*, 114 U. S. 52.

(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56.

(1906) *Alabama, etc. Co.* v. *Thompson*, 200 U. S. 206.

Counsel's discussion about the value of our easement of support is wholly immaterial. Likewise, respondent's mention that at one stage of the proceedings the Willing defendants urged multifariousness in the amended bill of complaint has no bearing upon the question of whether the case made by the plaintiff in the state court was removable to the federal court. And so also as to respondent's unhelpful comment that these petitioners raised the question of federal jurisdiction only when it

seemed the battle was going against them. Notwithstanding a favorable decree in the District Court, these petitioners, in their brief as appellees in the Circuit Court of Appeals mentioned and preserved the point as best they then could. (See also R. 638.) Cross errors cannot be assigned by a successful litigant on appeal in federal equity courts. (1925) *National F. I. Co.* v. *Elliott*, 7 Fed. (2nd) 522, 527. The question was thoroughly debated in the District Court and was considered at the first available opportunity in the Circuit Court of Appeals.

IN RE THE MORTGAGE TRUSTEE.

Respondent's counsel, having made the concession as to indispensable parties first above noted, approach differentiation as to the mortgage trustee with admitted reluctance, and for good cause. Just why or how counsel can say the trustee is not an indispensable party in its suit against the Sears-Slater trustees is beyond our understanding.

Again returning to the case made by the plaintiff in its bill filed in the state court—for that must be our point of beginning—we find the plaintiff relating that the mortgage trustee by conveyances from the plaintiff has right, title and interest in and to so much of the building and leasehold as rests upon the Sears-Slater fee; that, indeed, the two mortgages are spread over the building and leasehold on all the fees; and that the plaintiff wishes to destroy a very substantial portion of the property so conveyed to the trustee and to substitute other security. How can it be said that to a bill containing such averments the trustee was not an indispensable party defendant?

Later, the bondholders were added to the roster of defendants. Service by warning was obtained. Some appeared, denying the rights of the plaintiff. And, statements of respondent's counsel notwithstanding, the trustee has in fact been an active resistant. Counsel for the trustee co-operated with the active defendants throughout the case; argued the motion to dismiss the bill; answered (R. 104, 143) denying plaintiff's cause of action; participated in the taking of evidence; wrote a portion of our briefs in the Circuit Court of Appeals; argued orally in the Circuit Court of Appeals, and has otherwise evidenced opposition to the relief sought by plaintiff against the trustee. It makes no difference that counsel for the respondent do not think the trustee ought to be resisting, or why the trustee does resist; the point is that by its bill of complaint the respondent set forth facts indicating the imperativeness of the trustee as a party, has not dismissed the trustee out of the case—and that the trustee is a citizen of Illinois.

Thus, there were when the suit was removed and there are now citizens of Illinois aligned in law and in fact as defendants with the foreign Sears-Slater defendants, all enmeshed in one controversy, unseparable from the Illinois plaintiff and the foreign removing defendants.

### C. "PLAINTIFF'S RIGHT TO REBUILD."

With the assertion that there are no controverted issues of fact the determination of which can affect disposition upon the merits, counsel for respondent devote a substantial portion of their brief to an appeal for the Supreme Court, if jurisdiction be sustained, to direct the entry of a decree establishing the substantive rights of the parties. (Respondent's Brief, 3; also 102 to 143.)

Whatever may be the holding of this court upon the jurisdictional questions, we submit it is improper to determine now the so-called merits of the case.

The petition for a writ of certiorari was prayed for and the writ was allowed because of averred errors committed by the Circuit Court of Appeals as to jurisdiction, and naught else. Neither the District Court nor the Appellate Court touched upon the merits. In its opinion, the Circuit Court of Appeals says:

> "In this opinion we have refrained from stating appellees' fact position regarding this clause in the lease. We have done so for the reason that we are not concerned with the *controverted facts* bearing on this issue. We want the district court to know that we have not in any way intimated our views respecting these facts, or the persuasiveness of the facts on either side. Our sole question is to determine whether a court of equity should take jurisdiction of the suit. The trial court must determine whether the facts justify the relief sought. And its approach to this question should be uninfluenced by anything we may have said on the legal question here under consideration."

The following decisions of the Supreme Court hold that any effort by us to bring up for consideration matters undecided below and not relied upon in seeking this review would be improper:

(1927) *Steele* v. *Drummond*, ..... U. S. .....;
48 S. C. Rep. 53.

(1924) *Webster Electric Co.* v. *Splitdorf Electrical Co.* 264 U. S. 463 on 464.
(1918) *Alice State Bank* v. *Houston Pasture Co.* 247 U. S. 240 on 242.
(1898) *Hubbard* v. *Tod,* 171 U. S. 474 on 494.

Again, the instant case, unlike respondent's citation of *Sharon* v. *Tucker,* 144 U. S. 533, does present controverted issues of facts. In our last above quotation, we have italicized words which show that the Circuit Court of Appeals thinks there is such a controversy. The contents of Judge Wilkerson's opinion, in so far as evidence is recited, are not judicial findings. (*Federal Life Insurance Co.* v. *Rascoe,* 12 Fed. (2nd) 693 on 695.) There is no lower court adjudication or consideration of the issues of fact, and no error is or can be assigned by any party against any decision upon the merits.

The relief sought by the respondent as plaintiff, if jurisdiction exist, demands a painstaking examination of hundreds of pages of testimony and many exhibits. Any decree that might be entered must construe in detail the covenants of leases and trust deeds, must define the nature, cost and specifications of the projected new building, must specify the securities to be deposited during reconstruction, must indicate what portions of the leases are to be stricken out as to purchase of the building at the end of the term and so on. None of these questions has been considered in the lower courts. That the petitioners would have much to say about them may best be shown by the following summary of points and authorities which, at a proper time and under proper circumstances, we shall be prepared to submit.

## I.

**IT IS CONCEDED NO PROVISION OF ANY LEASE OR OTHER INSTRUMENT EXPRESSLY GRANTS TO THE TENANT A RIGHT TO TEAR DOWN THE EXISTING BUILDING, OR TO REBUILD EXCEPT IN CASE OF FIRE.**

## II.

**IN THE ABSENCE OF ANY SUCH EXPLICIT AUTHORIZATION, THE INQUIRY IS: DO THE LEASES CARRY, BY NECESSARY IMPLICATION, THE PARTICULAR RIGHTS CLAIMED BY THE TENANT?**

In any hearing upon the merits, we should contend the answer is negative. Among the reasons are:

(a) THE LANDLORDS, AS FEE OWNERS, RETAIN ALL DOMINION NOT EXPRESSLY GRANTED OR NECESSARILY TO BE IMPLIED AS GRANTED FROM THE TERMS OF THE LEASES.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

(1874) *Agate* v. *Lowenbein,* 57 N. Y. 604.

(1853) *Smyth* v. *Carter,* 52 Eng. Rep. 31, 18 Beav. 78.

(1920) *Woolworth Co.* v. *Nelson,* 204 Ala. 172; 85 So. 449.

(1913) *Cawker* v. *Trimmel,* 155 Wis. 108, 143 N. W. 1046.

(1884) *Davenport* v. *Magoon,* 13 Ore. 3.

Unless the landlords have granted to the tenant the particular rights claimed—rights which would enable the tenant to virtually unrestricted use of the land, including complete alteration of the reversion—the tenant has no such rights. All cases on waste, cited hereafter, support the principle. Hence, it is the rule that

a plaintiff lessee has the burden of proving any grant by implication, and that any doubt must be resolved in favor of the owners. And the principle is all the more apparent where, as here, the tenant has no freehold, but only contractual rights during a term of years. We should contend this respondent cannot carry this burden of proof.

(b) All the Express Covenants Indicating What Shall Be Done Carry Implied Covenants as to What Shall Not Be Done. This Is the Illinois Law.

(1916) *Purvis* v. *Shuman*, 273 Ill. 286.
(1905) *Sullivan* v. *Monahan*, 123 Ill. App. 467.

Among such covenants are affirmative covenants, performable by the tenant, to erect a certain building; to keep that building in good repair and in a safe and secure condition and all rooms therein in a good, safe, clean and tenantable condition during the entire term; to rebuild or repair that building upon the same plan if damaged by fire; to let that building stand as security for rent and for performance of all covenants, and to yield possession of that building at the end of the term upon payment for that building by the reversioners.

The evidence shows that the original building plans were drafted early in 1886. (R. 223.) Construction was commenced in 1886. (Def's. Ex. 1.) But the leases were executed on January 17, 1887, effective as of August 1, 1886. Obviously, the parties contracted on the basis of the precise building then fully planned and under construction. No other building was mentioned or contemplated, except in case of destruction or damage by fire, in which event the tenant "shall rebuild or repair *the same* upon the same plan as before the said fire hap-

pened, or such other plans as by the [landlords] shall be approved in writing, and have the same rebuilt and ready for occupancy within two (2) years." If the parties intended to grant to the tenant, as respondent now claims, the right to tear down and rebuild at its caprice, the above covenant might as well have been omitted. Could it have been that the landlords were concerned about control of restoration after a fire, but were unconcerned about that control if destruction transpired otherwise?

The effect of the supplemental leases of July 9, 1891, is important. By this supplement, the parties eliminate the original provisions for fixing rent and extend the term 100 years. Then they say:

> "* * * all the covenants, agreements, conditions and provisions of said original lease except as hereby modified, shall be and continue in full force and effect until the final expiration of the term demised by said lease as modified and extended by this agreement."

It was equivalent to a re-execution of the leases in 1891. Whatever options the tenant originally had as to the nature of the building have now been exercised and the entire tract has been filled by a structure thus found in 1891 sufficient to comply with the original lease. The parties knew it, too, and, by such ratification of the original lease, they put their stamp of mutual approval on performance of the then executed provisions. Said provisions originally executory are now become executed and approved, and in so far as they related to erection of the original building, its materials, its cost and its meagre specifications, these provisions are *functus officio.* (1902) *Holt* v. *Fleischman,* 74 N. Y. Supp. 894.) Thus, after erection of the first building, there remain no stipulations as to the nature, the cost or the

material of any other future building except in case of fire. Pursuing respondent's contention, however, if the tenant may tear down voluntarily to rebuild, the tenant can erect some new building, unlimited in almost any respect by the leases. Can it be conceived that the landlords intended their tenant to rebuild the first building upon the same plans in case of fire, but to be totally unrestricted as to what it could build in case of voluntary destruction? The parties inserted a careful provision to cover the only allowable instance of removal—fire. They omitted any provisions whatever concerning voluntary removal; they did not contemplate such possibility.

Finally comes the covenant of the landlords to pay the tenant for the building at the end of the term. What building?

Here we must read the whole lease with the particular covenant, and put ourselves in the place of the parties, realizing that the exact scope of the project was known to all parties in 1886 and was crystallized by 1890. They then could make some estimate of the maximum amount the reversioners must pay. To believe that a fee owner would turn the use of his land over to a tenant with concomitant power to erect any sort of building of unlimited cost, simultaneously agreeing to pay for such building and it possibly erected a very few years before the end of the term, would be to believe improvidency bordering lunacy. Suppose a future tenant should build a railroad station costing $100,000,000 five or ten years before the term expires: can it be thought the reversioners intended to pay for that? Not at all; they agreed to pay for the only building ever authorized—the building on the premises when the leases were made in 1887 and remade in 1891.

(c) The Building, as and When Constructed, Became and Is the Landlords' Property.

(1865) *Kutter* v. *Smith*, 2 Wall. 491.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

The reference is made to remove any possible misconception that perhaps the tenant ought to be able to do as it chooses with its own property. It is *our* building the respondent seeks to destroy—a building of which the respondent has only the *use*. If it be, as we deny, that the building is not maintainable by reason of inadequate design, the fault is the fault of the respondent who, under contract, planned and erected it, knowing full well that brick by brick it became the landlords' property for all time.

(d) The Covenant to Keep the Building in Repair Would Be Broken by Voluntary Removal, Even Though the Removal May Not Be Presently Injurious.

Covenants in the lease in (1897) *Bass* v. *Metropolitan West Side Elevated Co.* 82 Fed. 857, are in most particulars similar to the covenants in the Auditorium leases, especially the covenants to rebuild or to keep the structure in good repair. The Circuit Court of Appeals in Illinois, in the *Bass* case, held that covenants like the above, coupled with facts also similar to those here found, did not permit removal of a small portion of the building, even though not injurious to the reversion. At the top of page 862, it is declared:

> "* * * it is clear upon the whole instrument that in no event was a removal from the premises of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceiv-

> able contingency can there arise under the contract a right on the part of the lessee to remove the building, even were it a physical possibility to do so."

And this remains true, though such removal might be for the purpose of replacing the existing building by a better one. The *Bass* case alone should be sufficient authority. However, reference may be had to (1885) *Dooly* v. *Stringham*, 4 Utah, 107; 7 Pac. 405; (1884) *Davenport* v. *Magoon*, 13 Ore. 3, (1911) *Abel* v. *Wuesten*, 143 Ky. 513; 136 S. W. 867.

In passing, some inquiry may be made as to whether the building the tenant here says it proposes to erect is, for all pertinent purposes, really a better one. The landlords are concerned about the reversion as well as present security. A new, specialized, screen-walled hotel or similar skyscraper may afford greater net revenue than the existing building, but its physical life may be much shorter than the edifice of granite and stone now standing. At the end of the term, it is highly probable the present structure, if kept in repair, will be in better condition than would a skeleton of steel covered by a terra cotta shell. So, when using the word "better," the tenant really means better in the sense of immediate revenue and use, and forgets that no one can predict what will be better at a later time.

(e) The Leases Specify the Exact Security Assured to the Landlords for Performance by the Tenant; Any Other Security Is Negatived.

The leases provide (R. 42, 58, 78, 97) that if default shall at any time be made by the tenant in performance of any covenant to be kept by it, including payment of rent, rebuilding after fire and insuring, the landlords shall have a right to declare the term ended and to re-

enter, meaning and intending thereby to give the landlords a valid and first lien upon the leasehold, and in event of such re-entry the landlords are relieved from their obligation to pay any compensation for the improvements.

Further to maintain this security, the tenant covenants to keep the building in good repair and in a safe and secure condition, and the rooms in a good, safe, clean and tenantable condition and repair during the entire term, and to maintain insurance above fixed minimums, and to rebuild or repair the building, in case of fire, within two years upon the same plan as before the fire or upon such other plans as the landlords might approve. Any insurance collected is payable to the landlords and not deliverable over to tenant unless and until the fire loss is physically repaired or replaced. The owners protect themselves in the event of fire loss and again are careful in demanding restoration in kind and the custody of the insurance proceeds until their architect certifies to the restoration of the same building or one they have approved.

The care and forethought expended in these provisions evidence an affirmative intention as to exactly what their security shall be, and, under the rules of law above noted, operate just as efficiently to contradict the idea that any other security ever can be substituted. But the respondent seeks to have a court, by decree, declare that the building may be torn down; that the only security we ever agreed to accept be taken away from us; that other and different security (presumably bonds) be forced upon us and upon the bondholders during demolition and reconstruction, and that eventually we shall get a new building costing many millions for which we must pay. That, we should urge if and when the issue is presented, is not permissible and is not within the judicial

power. That, we say, would be the destruction of our contracts and the making of new contracts by judicial coercion.

But, argues respondent, the very duration of the term necessarily inculcated the notion of replacement. To support that assertion, counsel mention cases that are not in point at all because in those cases the buildings were invariably of temporary or different nature. Thus in *Doherty* v. *Allman*, L. R. 3 App. Cas. 709, the term was 999 years and the building was an old grain barn. Other cases involved business houses or dwellings. How different is our situation with a structure built like a castle! "Stone such as was used in the exterior construction of the building as to durability is considered the most permanent of the building stones of limestone nature, almost equal to granite," testified Edward A. Renwick. (R. 394.) Later he said:

> "My opinion is that it will remain two hundred years safe and secure with ordinary attention to wear and tear."

The permanency of a monument was sought and obtained in the construction of the Auditorium because it was designed and intended to stand as a semi-public institution. No similar building in Chicago or anywhere else ever had been torn down at the time. (R. 371.) The idea would have been repudiated with abhorrence had it ever been suggested to the original parties as a future possibility.

"Shall rebuild or repair the same upon the same plan" speak the contracts, which is very different from the covenant in the lease construed in *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97, cited by respondent. There, held the court, the main object of the stipulations of the leases was simply to maintain the security for rent and the restoration of the property in an unimpaired value at

the end of the term. "They were dealing with the security of values" (per Judge Severens, p. 100). So long it was held, as the tenant maintained security, he was not obligated after destruction by fire to restore the identical buildings. The case at bar does deal with security to landlords and to bondholders, indeed; but there is here a further compelling element—that of intention of all parties that the building as planned and completed should stand or be replaced for definite institutional uses.

(f) A Tenant Who Has Covenanted to Keep a Building in Repair Must Do Whatever Is Necessary to Maintain the Building, Even as Against Vis Major; Much More, Then, Against the Tenant's Own Acts.

(1875) *Ely* v. *Ely*, 80 Ill. 532.
(1908) *Bushwick Realty Co.* v. *Sanitary Co.* 114 N. Y. Supp. 13.
(1912) *Jacobs* v. *McGuire*, 136 N. Y. Supp. 64.
(1911) *McKinley* v. *Jutte & Co.* 230 Pa. St. 122; 79 Atl. 244.

It is no excuse that respondent may have constructed an auditorium building presenting unusual difficulties to maintain in good repair. Design and construction were respondent's own acts.

(g) "Changing Circumstances," "Hardship," "Lack of Commensurate Return," Etc., Urged by Respondent, Do Not Excuse Nonperformance of Explicit Covenants in the Contracts, and Especially Do Such Facts, Even if Proven, Not Empower Any Court to Condone Nonperformance by Implying New or Different Covenants.

(1865) *Ingle* v. *Jones*, 69 U. S. 1.
(1869) *Sheets* v. *Selden*, 7 Wall. 416.

(1919) *Columbus Ry. Co.* v. *Columbus*, 249 U. S. 399 at 411.
(1896) *Blake* v. *Pine Mt. I. & C. Co.* 76 Fed. 624 at 638.
(1895) *Postal Telegraph Co.* v. *Western Union Telegraph Co.* 155 Ill. 335.
(1925) *Keough* v. *Peck*, 316 Ill. 318.
(1924) *Calthorpe* v. *McOscar*, 1 K. B. 716; 93 L. J. K. B. 273.

None of the cases cited in respondent's brief detracts from the principle. Suffice it here to note that *Rector* v. *Rector*, 201 N. Y. 1 (Respondent's Brief, p. 64) is not the law in Illinois which has no such statute as New York; that *McArthur* v. *Hood Rubber Co.* 221 Mass. 372 (Respondent's Brief, pp. 40, 63, 124) was an *ex parte* proceeding, rendered inapplicable as a precedent here by *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242, and that all other similar decisions mentioned by respondent's counsel or by the Circuit Court of Appeals are foreign to the Illinois subject matter.

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Furthermore, the facts themselves under this heading are most seriously controverted. We have shown that the changes in the environment of the Auditorium Building have been to its advantage, not its detriment; that for forty years Chicago's business district has been growing up to, not away from, the Auditorium; that it is now surrounded by the finest buildings, hotels, shops and theaters; that in its commanding position along the famous Michigan avenue sky-line of skyscrapers it is outstanding in beauty of line; and that architecturally it continues ever to be an artistic credit to any great city. Respondent's president admits (R. 245-9) that it con-

tains an unsurpassed auditorium, which is the purpose for which it was created.

We have further shown that financially the Auditorium Association is in the best condition of its existence; that the Association was never intended to earn pecuniary profits; that it has quick current assets of $575,843.85 as shown by its last available balance sheet, and that only the processes of bookkeeping, recently installed to prevent payment of income taxes, have developed charges for depreciation which, on paper, present the basis for averments of great losses. Taxes have risen, but so have rents and other income. Excepting for the revised post-war system of accounting, the Association shows a net plus surplus in earnings of over $493,000 during 1919 to 1924. On December 31, 1924, the Association owned securities, largely government bonds, aggregating $367,000; had cash on hand of $160,000, and other admitted assets aside from its leasehold.

We are not to be understood as contending that the respondent's financial condition is all its present stockholders could ask, or that with the commercial building they would like to erect the earnings might not be much greater. But we are to be understood as declaring the evidence shows that the Association *is* able to continue in its present quarters and to perform its obligations.

As to stability of the building, there is much testimony, with some divergence. Respondent failed to prove the building now or ever unsafe; it is constantly in use, housing hundreds of office tenants, thousands of hotel guests, tens of thousands of theater attendants. It has stood nearly forty years with never an interruption. There has not been a fracture of any ma-

jor structural member. The margin of safety of materials has overcome alleged overstresses. No column, truss, beam or girder has ever showed any sign of failure. Settlement has virtually ceased; what little there has been since the year 1915 is measured in hundredths of a foot, and causes no apprehension to the Association's own architect. Such running repairs as are necessary or ascertainable for the future can be made. The most that has been shown by respondent is, as Judge Wilkerson indicates, that *without repairs* there is reasonable ground to believe it *will* become unsafe; but the tenant is obligated to and must make those repairs.

Upon the facts, the situation of the Auditorium Building does not bring it within the doctrine of any decision submitted by respondent's counsel, and, as we have said, none of their decisions is here applicable.

(h) The Tenant's Program, Which the Courts Are Asked to Declare Lawful, Violates the Law of Waste.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

(1900) *Williams* v. *Chicago Exhibition Co.* 188 Ill.; 19 (*semble*).

(1832) *Winship* v. *Pitts,* 3 Paige Ch. 259.

(1921) *McDonald* v. *O'Hara,* 117 Misc. Rep. 517; 192 N. Y. Supp. 545.

(1910) *Hamburger* v. *Settegast,* 62 Tex. Civ. App. 446; 131 S. W. 639.

(1911) *Abel* v. *Wuesten,* 143 Ky. 513; 136 S. W. 867.

(1884) *Davenport* v. *Magoon,* 13 Ore. 3.

(1920) *Woolworth Co.* v. *Nelson,* 204 Ala. 172; 85 Sou. 449.

(1899) *Melms* v. *Pabst Brewing Co.* 104 Wis. 7.
(1913) *Cawker* v. *Trimmel,* 155 Wis. 108; 143 N. W. 1046.
(1859) *Parkman's Adm'r* v. *Aicardi,* 34 Ala. 393.
(1885) *Dooly* v. *Stringham,* 4 Utah, 107; 7 Pac. 405.

Counsel for respondent emphasize that English rules about waste and the alteration of demised premises are not applicable to American conditions, but, curiously, nearly all of the decisions on the point relied on by respondent are English cases. We can, if ever the time comes when the merits of this case are properly presented, distinguish the English cases. But the above considerable list of American decisions bears out our contention that the respondent asks the court to permit it to commit waste. See, also, 1 Tiffany, Landlord & Tenant, pp. 716-7; Jones, Landlord & Tenant, Sec. 632, and McAdam, Landlord & Tenant (4" Ed.), 1284.

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No useful purpose would be served, we think, by prolonging this discussion of questions not properly before the Supreme Court. We have only touched upon some of our contentions; we have barely summarized our ideas of the evidence; we could and should have much more to say if the so-called merits of the case were involved in this review.

We believe we have said enough to convince the court that the substantive equities should be decided, if jurisdiction ever exist in a court, only after careful consideration and a full hearing in the lower courts. And we further believe our outlined points and the many authorities barely noted thereunder will, in any event, bear out the validity and justice of the petitioners' position.

### D. THE EQUITIES OF THE CASE.

Counsel for respondent have painted a picture in which the Chicago Auditorium Association is made to appear as having been deprived of deserved advantages by an unconscionable refusal of the landlords to permit rebuilding. Heretofore, counsel for respondent have said:

> "What the lessors want is to get rid of the leases, or to force the lessee to enter into new leases at a higher rent."

It now seems fair to deny the assertion and to rebut the charge with facts. The petitioners never have made any attempt to get rid of the leases and they are not trying to force the tenant to enter into new leases at a higher rent.

So long as the Auditorium continues in the use for which it was intended, and so long as the tenant performs its covenants, the petitioners remain contented. They are not trying to force anything. Their protest arises only when the tenant seeks to discontinue that use, which result, its counsel concede, is not possible without the intervention of a court to strike out covenants of the leases and to write in new ones. The petitioners do admit the program of their tenant, if carried out, requires new leases or some definitive rearrangement by contract, but they insist that no court has the power to make the rearrangement. It is a proper subject for bargaining, and not for the infliction of judicial force.

Comment has been made that while Mr. Clinch talked with Mr. Willing (R. 253-4), the latter made no mention of any desire to have the Auditorium retained for its institutional purposes. That topic was not involved in the conference, and had expression of any such view been advanced by Mr. Willing the words would have fallen on

deaf ears. Replying merely to the business proposal, the landlords had in mind these considerations:

Take the Willing fee comprising about 80 per cent of the entire ground area. It was purchased by Wirt Walker, one of the Auditorium organizers, and the Chicago Auditorium Auxiliary Co., and James R. Walker, prior to 1887. These men are no longer alive, but the name of the auxiliary company and participation of the Walkers is sufficient indication that their purchase was part of the general scheme to provide an auditorium for Chicago, and that they expected eventually to sell the fee, get their money out, and let the Auditorium carry the land by payment of rent. The fee was sold on March 17, 1890, to Henry J. Willing, for $475,000 (Plaintiff's Ex. 9), subject to the leases made in January, 1887. But those leases fixed the value of the Willing fee at only $420,000 from 1886 to 1906—twenty years— and the rent during that period at 5 per cent on the $420,000. Why would Henry J. Willing pay $475,000 in 1890 for a yield of only 5 per cent on $420,000 for twenty years? Doubtless because he believed that the appraisement in 1906 under the Walker leases, with rental increasing to 6 per cent on the new valuation, would make up whatever loss he sustained on the $55,000 differential. Property values were gaining rapidly (Bradley testimony, R. 288), and were certain to increase continuously. The purchase at its inception promised a prospective good yield to Mr. Willing and permitted the organizers of the Auditorium enterprise to release their own funds.

But what took place just after this in the fiscal history of the Chicago Auditorium Association? Flatly put, it was facing bankruptcy. All estimates of cost had

been far exceeded. (Defendants' Ex. 1.) Additional construction and extras had augmented expenditures. An original stock issue of $750,000 and a bond issue of $900,000 dated February 1, 1889, had been exhausted. Stock was increased first to $1,500,000, and then to $2,000,000 in December, 1889, and $1,765,300 of it was sold at par. A month after Mr. Willing bought the fee, the Association floated $497,000 of 6 per cent debentures, and still owed $200,000. (Plaintiff's Ex. 21; R. 203.) The first annual report of earnings from office tenants came May 1, 1890; from the hotel March 1, 1891, and from the theater about January, 1891, and the situation a year after Mr. Willing's purchase became so acute that the board of directors met to find ways and means to save the institution. (Plaintiff's Ex. 21.) The suggested solution was a new bond issue consolidating all indebtedness—holders of the first mortgage bonds, holders of indentures and other creditors to accept, par for par, bonds of a consolidated issue of $1,600,000 due in 1942. But floating of the proposed new issue seems to have required some diminution of fixed charges involving concessions by the landlords. This is how it was done:

In July, 1891, Mr. Willing and the Association entered into a new agreement whereby Mr. Willing relinquished the revaluation clauses of 6 per cent by which he had expected to make commensurate return on his investment of $475,000 for a $420,000 income producer. His concession, made with the certainty that land values were advancing—Mr. Bradley (R. 288) tells that the Studebaker lots already had risen from $16,666.67 to $30,000—enabled the corporation to float its consolidated bonds and made it possible for the Auditorium to live for Chicago. It is inconceivable that Mr. Willing would

have consented to the elimination of the fulsome revaluation covenant and to an extension of the term for 100 years if anyone then had had the most remote idea that during the term the Auditorium ever would be replaced by a building designed for the private gains of the tenant and abandoning the chartered objects.

When the Association, equipped with a building designed for public and semi-public purposes, and burdened by debts threatening termination of its activities, besought aid, Henry J. Willing, as principal landlord, met the crisis more than halfway. The owners of the Sears-Slater corner joined in the rescue, for the same reasons and to the same end. The Studebakers, being nonresidents of Chicago, cared less for the city's aspirations, and we find them still clinging to their revaluation clause, getting for their narrow Michigan avenue frontage about as much rent as the other landlords put together.

Our point is not that Mr. Willing and the Sears-Slater interests were philanthropists in 1891 and by reason thereof now are entitled to especial favors. Our point is that the landlords, when apprized of the financial condition of the Association in 1891, realized that if the Auditorium was to continue, they must make concessions. Whether any civic pride in perpetuation of the enterprise entered into their considerations then is not our point. We treat it as a purely business proposition: the landlords desired to keep their tenant, and the tenant desired to finance itself, and both contemplated continuance of the Auditorium Building. To that end, they again bargained, and to that end the petitioners consented to elimination of revaluation clauses, in the belief, with the understanding and in the expectation that the identical undertaking should go on and on and

on throughout the term. If either landlords or tenant on July 9, 1891, ever had mentioned, or if the landlords had even imagined, that the land would later be put to a use differing from the then Auditorium, the exigencies of the times would have been met by temporary modifications and all provisions preserving the value of our investment in event of subsequent altered uses would have been retained.

When in 1922 it was revealed that a proposed new building would abandon the original ideals and would serve first, last and only the financial aggrandizement of the tenant, then indeed did the owners make protest unless they, too, were permitted to share in the division of the unearned increment.

Nor was there anything unfair in their offers. They were more than fair. For instance, the respondent (R. 286) values the two Willing fees now at $3,118,000, and the Sears-Slater fee at $500,000. Mr. Willing (R. 253) mentioned selling for $1,500,000—less than half its value; and the Sears-Slater trustees offered to negotiate on a basis of $350,000. On a revaluation basis, the Willing fees, now yielding exactly $30,000 a year rent, would, on a conservative basis, bring in more than $180,000; and the Sears-Slater fee, now yielding $14,000 a year, would bring in at least $30,000. No one knows what the future promises. Values probably will ascend. But suppose there is no increase: there is a present difference between the rents received on the flat figures established in 1891 and the rents the landlords would be receiving under the revaluation provisions amounting to over $166,000 annually. Multiply that by the 160 years of the term still to pass, and we find a minimum of $26,560,000 unearned increment which the court is asked to turn over in its entirety to the tenant by de-

creeing it the permission to tear down our building and to abandon the objects which persuaded us to eliminate the very clauses which, if retained, would unassailably place that $26,560,000 in our lawful possession.

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These are facts and some aspects of this Auditorium case not portrayed in the picture drawn by the respondent. They are very vital and persuasive factors. The only possible way by which any court can permit the tenant to tear down our building, change the security of landlords and bondholders during demolition, and substitute another wholly different building, is for that court to make to some extent a new contract between the parties.

However, we are not asking any court to do any affirmative act. We made no complaint about lack of return commensurate with the present value of our fees. We were content to go along. But when our tenant seeks to have a court revamp the relationship wholly to the tenant's gain at our expense, our endeavors to resist the tenant's unwarranted application to the courts for the purpose must, we confidently submit, be deemed as equitably meritorious as they are legally sound.

Respectfully submitted,

CHARLES E. HUGHES,

SAMUEL TOPLIFF,

HOMER H. COOPER,
*Counsel for Petitioners.*